OCT 7 1952

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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## No. 382

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FLAVIANA TAN, WIDOW OF ANICETO BERNAL, IN HER OWN RIGHT, AND AS NATURAL GUARDIAN OF HER MINOR CHILDREN, JOSE BERNAL, FIDEL BERNAL, EMILIANA BERNAL AND MILAGROS BERNAL, BY HER LAWFUL HUSBAND, ANICETO BERNAL, *Petitioners,*

*vs.*

THE UNITED STATES

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

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PREW SAVOY,
*Counsel for Petitioners.*

GEORGE A. NUGENT,
H. H. MARTIN,
*Of Counsel.*

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*vs.*

THE UNITED STATES,

*Respondent*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

---

Prew Savoy, on behalf of Flaviana Tan, widow of Aniceto Bernal, in her own right, and as natural guardian of her minor children, Jose Bernal, Fidel Bernal, Emiliana Bernal and Milagros Bernal, by her lawful husband, Aniceto Bernal, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled cause on July 15, 1952, overruling a Motion for New Trial filed May 2, 1952 (time for filing having been extended March 7, 1952, upon plaintiff's motion of March 5, 1952), following the judgment of said Court dismissing the petition, entered February 5, 1952.

## Opinions Below

The opinion of the Court of Claims (Record), is reported in 102 F. Supp. 552, and the opinions of February 5, 1952, and July 15, 1952, in *Marcos* v. *United States*, upon which it is based, are reported in 102 F. Supp. 547 and 106 F. Supp. 172, respectively.

## Jurisdiction

The judgment of the Court of Claims was entered July 15, 1952 (Record), overruling a Motion for New Trial filed May 2, 1952 (time for filing having been extended March 7, 1952, upon plaintiff's motion of March 5, 1952), following a judgment dismissing the petition, entered February 5, 1952.

## Statutes—Presidential Proclamation—Treasury Rulings Involved

The statutes, the Presidential proclamation, the Presidential license and the Treasury rulings involved will all be found in Appendices A to C.

## Questions Presented

Do the facts, as disclosed by the Record and admitted for the purposes of Defendant's Motion to Dismiss and this Petition, under the Constitution of the United States and the laws and decisions applicable, establish:

(1) That plaintiffs' claim accrued November 3, 1941, so that the Statute of Limitations began to run on that date, as held by the Court of Claims; or

(2) That plaintiffs' claim, which arose November 3, 1941, did not accrue until:

(a) June 11, 1949, the date upon which the demand for payment by plaintiffs was for the first time administratively refused—not passed upon by the Court; or

(b) October 22, 1946, the effective date of the Treaty between the United States of America and the Republic of the Philippines—not passed upon by the Court; or

(3) That the Statute of Limitations had run on the date on which the Petition was filed in the United States Court of Claims, as held by that Court; or

(4) That the petition was timely filed (a) because filed within six years of the date the claim accrued, or (b) because if the claim be held to have accrued November 3, 1941, the Statute of Limitations was suspended until a date beyond September 2, 1945, and had not expired on August 14, 1951, the date on which the petition was filed in the Court of Claims.

**Statement**

The facts conceded to be true by the defendant upon its Motion to Dismiss, briefly stated, are as follows:

(1) Following the creation of the command, United States Armed Forces in the Far East (USAFFE) on July 28, 1941, and shortly before the entry of this country into the War with Japan, December 7 (December 8, Philippine Time), 1941, the United States Army officials stationed in the Philipines, realizing the imminent danger of war, began the emergency construction of the Santo Tomas Cantonment Area, in Santo Tomas, Batangas Province, Island of Luzon. This construction work was in the direct charge of Civil Engineer Cleto Asprec, United States Army Corps of Engineers, acting under instructions from his superior officers in USAFFE. This work was carried on in twenty-four-hour shifts (Petition, par. 4).

(2) Acting under these instructions, the said Asprec did, during the period October 1, 1941, to November 3, 1941,

cause to be procured from one Aniceto Bernal, a Philippine national residing in Tanauan, Batangas Province, Luzon (the then owner of the property involved and the lawful husband and/or father of the plaintiffs) (Petition, par. 8), a large and valuable quantity of lumber and other construction material required in the said construction work (Petition, pars. 2, 5 and 6).

(3) The said Bernal was advised by the said Asprec that, upon the delivery of the materials at the campsite and the presentation of vouchers approved by him, he would be paid the reasonable value of the material so delivered by the United States Army (Petition, pars. 5 and 7).

(4) Early in November, 1941, following the delivery to the USAFFE authorities at Santo Tomas of the material involved, Civil Engineer Asprec was transferred from Santo Tomas to duty in Pampanga Province, a considerable distance away from Santo Tomas (Petition, par. 7). Despite every reasonable effort by Bernal to obtain the necessary signatures to the payment vouchers, he was unable, prior to his death, on or about February 10, 1945, at the hands of the armed forces of Japan (Petition, par. 2), to obtain the required signatures to establish his right to payment (Petition, par. 7), nor has payment therefor since been made by the United States (Petition, par. 11). The vouchers were never presented for payment, not through any fault of Bernal, but due to the fact that the United States Army had reassigned the one person familiar with the facts, who was to approve them, Asprec, until the claim mentioned in paragraph (12) was filed.

(5) On December 13, 1941, the President signed a General License, and on February 12, 1942, a delegation of authority, pursuant to which the Secretary of the Treasury, on March 18, 1942, promulgated General Ruling No. 11, amended September 3, 1943 (App. C.)

(6) On September 2, 1945, Japan formally surrendered.

(7) Fighting, nonetheless, continued throughout the Philippines until late in 1946. Manila itself was perhaps the city which suffered the greatest destruction during World War II. Chaos reigned there until well after 1946. The Filipinos were demoralized throughout 1946. The Philippine National Bank did not open until July, 1946. Sending a petition and $10.00 to the Court of Claims was a practical impossibility. These facts are notorious.

(8) On June 30, 1946, the Philippines received their well earned independence and became juridically, if not in all respects, a sovereign and independent Nation.

(9) On August 31, 1946, the Secretary of the Treasury, by General Ruling No. 18 (App. C), as amended, permitted the transfer of funds from the Philippines to the United States, notwithstanding the prohibitory provisions of the Trading with the Enemy Act, in the absence of a treaty of peace or a proclamation of the President.

(10) The first treaty between the United States and the Republic of the Philippines became effective October 22, 1946. Article VI thereof acknowledged the validity of claims of nationals of the Philippines against the United States and provided for their adjustment by mutual agreement, but only if not "covered by existing legislation."

(11) The President of the United States, on December 31, 1946, proclaimed the cessation of hostilities of World War II. There was no treaty of peace between the United States and Japan in effect prior to that date.

(12) On or about March 31, 1948, claim for payment was submitted to the Army Claims Service by the widow of Bernal, on her own behalf and on behalf of her four minor children by Bernal (these children ranged in age from about two-and-one-half years to slightly over eight years) (Petition, par. 8 and Annex "A"), for payment of the reasonable

value of the material involved—$78,956.01 (Pesos—157,-912.04) (Petition, par. 10). This claim was, on or about June 11, 1949, disallowed by the Army Claims Service, allegedly for the reason that the evidence submitted was not sufficient to establish a favorable decision (Petition, par. 9). The authority for the Army Claims Service was terminated, as found by the Court in this case, on June 30, 1949.

(13) Following the disallowance of this claim, the plaintiffs filed in the Court of Claims, on August 14, 1951, a petition praying for relief. This petition was, on February 5, 1952, dismissed for the stated reason that it was barred by the Statute of Limitations.

(14) Under date of March 5, 1952, plaintiffs filed a motion for an extension of time to file a motion for a new trial to May 5, 1952, which was allowed March 7, 1952, and on May 2, 1952, plaintiffs filed a Motion for a New Trial, which was denied without opinion July 15, 1952.

**Specification of Errors to Be Urged**

The Court of Claims erred:

(1) In holding that the claim accrued November 3, 1941, and in failing to hold that the claim accrued June 11, 1949, when demand for payment was refused, or at least no earlier than October 22, 1946, when the Treaty between the United States and the Philippines became effective;

(2) In holding that the plaintiffs' claim was barred by the Statute of Limitations, when the petition was filed on August 14, 1951, and in failing to hold that the petition was timely filed, because filed within six years (28 U. S. C. A. 2501, App. A) of the date on which the Treasury permitted the transfer of funds from the Philippines to the United States, August 31, 1946, or of the date on which the Philippine Islands were *in fact* liberated from the Japanese occu-

pation, or of the date on which the President declared the cessation of hostilities of World War II, December 31, 1946, or of the date on which the claim was denied by the Army Claims Service, June 11, 1949.

## Reasons for Granting the Writ

### I

The decisions of the Court of Claims on the very question involved are in conflict and require clarification by this Court. In *Dino* v. *United States*, 119 C. Cls. 304 (1951), the Court of Claims held that a suit based upon a requisition by the Army could not be brought until a claim for payment had first been presented to the appropriate branch of the Government; yet, in the subject case, the same Court has held that, if such a claim for payment is so presented, as was done, the Statute of Limitations is not suspended while the claim is pending before the Government. In such a situation, claimants must either do a useless act, i.e., file a claim with the Executive Branch, at the same time as they must sue, and thus not give the Government an opportunity to pass on the claim prior to suit, or chance that the claim will be held to be barred by the Statute of Limitations, if suit is not commenced simultaneously. This cannot be correct. The two decisions cannot be reconciled.

The claims of these plaintiffs and the application of the Statute of Limitations are, in substance, the same fundamentally as those in *Marcos* v. *United States, supra,* in which the Court of Claims held that it had jurisdiction. If the plaintiff in that case establishes the alleged facts and receives a money judgment from the Court of Claims, the United States will unquestionably petition for a writ of certiorari, because of the importance of the question involved. In these circumstances, the petition herein should

be granted so that the fundamental questions involved in both cases may be determined by this Court.

Furthermore, unless this petition be granted, the *Marcos* case, and similar cases pending in the Court of Claims will have to be tried on the merits, which will require the taking of testimony in the Philippines, before this Court will review them, upon petition of the United States, to the great expense of the Government and the plaintiffs. A decision in the subject case by this Court should determine which of those cases should be so tried.

The question is of importance to hundreds of Filipinos. There are many thousands of dollars worth of such claims disallowed by the Army Claims Service which can be disposed of by a clear opinion, in this case, of the law applicable.

## II

Prior decisions, which we believe have announced principles which should have led the Court of Claims to a contrary decision, require clarification on the specific question involved, as the opinion of the Court below shows.

We believe that the decision below is contrary in principle to *United States* v. *Dickinson,* 331 U. S. 745; *United States of America ex Rel. Louisville Cement Company* v. *Interstate Commerce Commission,* 246 U. S. 638; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481; *United States* v. *Smith,* 105 U. S. 620; *United States* v. *Taylor,* 104 U. S. 216; *United States* v. *Clark,* 96 U. S. 37, and to decisions of the Court of Claims in *Scott* v. *United States,* 18 C. Cls. 1; *B-W Construction Company* v. *United States* (1943), 100 C. Cls. 267; and *Dino* v. *United States, supra.*

In *United States* v. *Dickinson, supra,* which involved the question of the Statute of Limitations, the United States contended that the statute had run before the suit was filed. This contention was overruled by the lower Court, 152 F.

(2d) 865. That decision was affirmed by the Supreme Court, in its opinion, where the following language applicable to the case at bar was used:

> "Property is taken in the constitutional case when inroads are made on the owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die."
>
> "When dealing with a problem which arises under such substances, procedural rigidities should be avoided * * *."

In *United States* v. *Taylor, supra,* claimant had a right to claim from the Secretary of the Treasury the surplus received upon a tax sale. He was required first to present his claim to the Secretary. Suit was brought more than six years after the claim arose. This fact was held to be no bar as there was no time limit within which he must submit his claim to the Secretary. Only upon that demand and a refusal to pay would the claim accrue.

In *United States of America ex Rel. Louisville Cement Company* v. *Interstate Commerce Commission, supra,* the Supreme Court had before it the question of determining whether the cause of action for damages accrued "when the goods were received, or delivered by the carrier, or when the freight charges were actually paid", and held that it "accrued" when the freight charges were paid. So, here, there was no breach of the implied contract to pay, upon which this suit is based, when the materials were delivered, but only when payment was refused. That occurred when the War Claims Service refused payment. The claim of this plaintiff against the United States then first *accrued.*

In *United States* v. *Smith, supra,* the Court noted the

distinction between it and *United States* v. *Clark, supra,* saying:

> "The reasons why this Court held that the Statute of Limitations which applies to actions in general in the Court of Claims, of six years, did not apply to Clark's action, have direct relation to the differences we have noticed between that case and this. The Court there said that until the accounting officers had refused to allow the claim in his accounts there was no occasion to establish it in the Court of Claims. There being no denial of his right, the Statute did not run."

In the *Smith* case, his right was authoritatively denied when he was ordered by the Postmaster General to, and did, pay the money. The Statute of Limitations then began to run, and as six years had elapsed before suit was brought, the claim was barred.

The subject case is indeed *Clark's* case.

The decision in the subject case is also at variance with principles announced in decisions of the Court of Claims prior to, as well as in the *Dino* case, *supra.*

In *Scott* v. *United States, supra,* plaintiff, a Quartermaster in the United States Army, filed suit July 7, 1879, under the provisions of R. S. 1059, for relief from liability for United States funds in his possession that were stolen on September 4, 1868, from a field safe in his Army quarters. No liability for the loss was imputable to the plaintiff, who, on April 17, 1882, in a letter to the Third Auditor, Treasury Department, asked for relief under the Statute. On April 18, 1882, the Treasury Department advised him that the relief available could only be had by a decision of the Court of Claims, as provided in R. S. 1059 and R. S. 1062.

The defendant defended on the ground that the six-year Statute of Limitations having expired more than six years after the date on which the funds were stolen, the Court of

Claims was without jurisdiction to hear the cause. This defense was overruled by that Court on the strength of *Clark's* case, 11 C. Cls. 638; *Hobb's* case, 17 C. Cls. 189; *United States* v. *Clark, supra;* and *United States* v. *Smith, supra,* which decisions—

> "* * * are to the effect that it [a claim by or against the United States] does not become a claim within the meaning of the law until there has been, on the part of the Government some authoritative demand for payment, or a refusal to allow the credit, and only from the time of such demand or refusal does the statute begin to run."

The Court, after quoting from the opinion of the Supreme Court in the *Smith* case, *supra,* where—

> "* * * it sufficiently appears * * * that claimant's right was authoritatively denied when he was ordered by the Paymaster General to pay the money, and that then was the proper time to apply for the protection of the Court of Claims by asking its decree that he should be credited on his accounts with that sum";

had this to say in the *Scott* case:

> "In this case it does not appear that there was any authoritative demand for payment, nor a refusal to allow a credit in accounts of the claimant, until April 4, 1882. The claimant's case, therefore, coming clearly within the rule laid down in the recent decision of the Supreme Court, is not cut off by the statute of limitations."

This same principle was recognized by the Court of Claims in the case of *B-W Construction Company* v. *United States, supra.*

There the case involved a contract for the construction of a Post Office and Court House. The building was substantially completed and occupied by the Government on

September 21, 1933. The contractor was, however, called upon by the Government to remedy "certain defects, including those in the panelling of court rooms".

The defects in question were satisfactorily remedied by the fall of 1935. Final voucher was signed by plaintiff on July 20, 1936, and paid shortly thereafter. Suit was not filed in the Court of Claims until April 5, 1941, more than seven and one-half years after the substantial completion and occupation of the building by the Government, and over five and one-half years after final acceptance by the Government. In that state of facts the defendant contended that suit should be dismissed, pleading the Statute of Limitations.

The Court of Claims, however, overruled the plea, holding that "it is clear under our decisions that it [the Statute of Limitations] does not begin to run until the work was finally completed and *final voucher* was presented" for payment. (Italics supplied.)

In *Dino* v. *United States, supra,* the Court of Claims held that because Dino had not presented his claim to the appropriate Government authority and had not had it disallowed, that Court had no jurisdiction to hear the claim. If Dino was required first to submit his claim to "proper officials of the War Department", the plaintiffs in the case at bar were justified, indeed required, to submit, as was done, their claim to the Army Claims Service, legally set up under the authority of the War Department to consider claims of the character involved. That being the fact, the claim did not accrue until payment was refused, or at least, during pendency of the claim, the Statute of Limitations was suspended. Otherwise, the Government could readily sit on a claim, let the statute run, and the claimant would then be out of Court. In fact, many claims were not acted upon by the Army Claims Service prior to the closing up of its operations on June 30, 1949.

Since the questions in this case involve the rights and remedies of thousands of our valiant allies at a time when we needed them badly, and since our Army got the benefit of their property, we believe that this Court should correct the decision below.

There are certain cardinal principles which ought to control this case.

(1) The Army has and had every right and power to requisition plaintiff's property in the all-out war.

(2) Plaintiffs had and have every right to just compensation therefor upon an implied contract, guaranteed by the Fifth Amendment to the Constitution of the United States.

(3) Plaintiffs must first have demanded payment of the Army and have had payment refused before the claim accrued and before they could sue in the Court of Claims.

(4) The Army Claims Service was set up to receive such demands for payment and determine the claims for payment on their merits.

(5) Plaintiffs were for the *first* time given an opportunity to demand payment and *first* demanded payment of the Army before the Claims Service established for that purpose, and payment was finally refused for the *first* time June 11, 1949. On that date the claim, which had arisen in 1941, as found by the Court, first accrued and they were entitled to sue in the Court, which they did, some two years later.

The ultimate question in this claim and in the other procurement claims of Filipinos is:

May the Army procure and use in the Philippines supplies and materials, vitally needed in the national defense during a bloody war, and then close the courts to a hearing on the merits on a purely technical construction of the Statute of Limitations? The only answer to this question under the Constitution is an emphatic "No"!

This principle is recognized by the Supreme Court in the case of the *Russian Volunteer Fleet* v. *United States, supra,* reversing 68 C. Cls. (1928) 28, on Motion of the Government that the Court of Claims was without jurisdiction under the Judicial Code, sec. 155 (now 28 U.S.C.A. 2502).

In its opinion, by Mr. Chief Justice Hughes, the Court said that—

> "• • •. The Provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of any other governments. The act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guarantee." (282 U. S. 481, 492.)

To fail to allow claimants to have their claim considered on its merits would, to paraphrase the words of the Chief Justice, (282 U. S. 481, 488), mean that "although the United States has actually taken possession of the property and was enjoying the advantages of its use" in the national defense of the country, and the alien owner was unquestionably entitled to compensation at the time of the taking, had it been practical then to determine its value, it was the intention of our Government that recovery should be denied, or at least be indefinitely postponed until the Congress made some provision for the determination of the amount payable other than through the Court of Claims.

This Court cannot possibly admit of such a conclusion.

## III

Finally, we urge that, if the claim be held to have accrued November 3, 1941, and to have been suspended by the War, the date adopted by the Court below on which the Statute of Limitations again began to run was too early in time, under the War Proclamation of the President respecting Japan,

(Appendix B), and the Trading with the Enemy Act of 1917, as amended, (Appendix A), since hostilities did not end until December 31, 1946, under General Order No. 18 of the Treasury Department, as amended August 31, 1946, (Appendix C), under the Treaty between the United States and the Republic of the Philippines, (Appendix D), effective October 22, 1946, or by reason of the First War Powers Act of 1941, (Act of December 18, 1941, c. 593, 55 Stat. 838) and the action thereunder of the Army Claims Service, and would not have expired until *after* August 14, 1951, the date on which the petition was filed in the Court of Claims. We believe that in the interests of our relationship with this new independent Nation, the Republic of the Philippines, it is necessary to a proper and equitable decision on the merits, in this and many other cases involving requisitions of property of Filipinos by our Army, which we had the benefit of in the war against Japan, that the questions involved herein be reviewed and decided. The importance of the question to the Philippines, as well as to us in the matter of our relations with them, requires that certiorari be granted, so that we may pay our just war obligations.

## Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PREW SAVOY,
*Counsel for Petitioners.*

GEORGE A. NUGENT,
H. H. MARTIN,
*Of Counsel.*

October, 1952.

## APPENDIX A

### STATUTES INVOLVED

*28 USCA Sec. 2501:*

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues."

• • • • • • •

"A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

*28 USCA Sec. 2502:*

"Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

TRADING WITH THE ENEMY ACT

*October 6, 1917, c. 106, Chap. 1, 40 Stat. 411, 50 App. USCA*

*Section 2:*

"The word 'enemy', as used herein, shall be deemed to mean, for the purposes of such trading and of this Act (sections 1-6 and 7-39 of this Appendix)—

> "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or in-

corporated within any country other than the United States and doing business within such territory."

• • • • • • •

"The words 'United States', as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof."

• • • • • • •

"The words 'end of the war', as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act (sections 1-6 and 7-39 of this Appendix).

"The words 'bank or banks', as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

"The words 'to trade', as used herein, shall be deemed to mean—

"(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

"(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

"(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

"(e) To have any form of business or commercial communication or intercourse with."

*Section 3:*

"It shall be unlawful—

"(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act (sections 1-6 and 7-39 of this Appendix), to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly, or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy."

• • • • • • •

"(c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into theUnited States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: • • •."

*Section 16:*

"Whoever shall willfully violate any of the provisions of this Act (sections 1-6 and 7-39 of this Appendix) or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any

order of the President issued in compliance with the provisions of this Act (said sections) shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerend in such violation shall be forfeited to the United States. Oct. 6, 1917, c. 106, Sec. 16, 40 Stat. 425."

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## APPENDIX B

### DECLARATION THAT A STATE OF WAR EXISTS BETWEEN THE IMPERIAL GOVERNMENT OF JAPAN AND THE UNITED STATES

A State of War between Japan and the United States was declared to exist by the Joint Resolution of December 8, 1941, c. 561, 55 Stat. 795.

#### Termination of State of War With Japan

The Treaty of Peace with Japan was signed in the City of San Francisco on September 8, 1951. Chapter 1, Article I, provides:

> "(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present treaty comes into force between Japan and the Allied Power concerned as provided for in Article XXIII."

The cessation of hostilities of World War II was officially proclaimed by the President of the United States, Proclamation No. 2714, 12 F. R. 1, of December 31, 1946, as follows:

> "Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II effective 12 o'clock noon December 31, 1946."

## APPENDIX C

### GENERAL LICENSE OF DECEMBER 13, 1941

General License Under Section 3(a) of The Trading with the Enemy Act

"By virtue of and pursuant to the authority vested in me by sections 3 and 5 of the Trading with the Enemy Act, as amended, and by virtue of all other authority vested in me, I, Franwlin D. Roosevelt, President of the United States of America, do prescribe the following:

"A general license is hereby granted licensing any transaction or act prohibited by section 3(a) of the Trading with the Enemy Act, as amended, provided, however, that such transaction or act is authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise, pursuant to Executive Order No. 8389, as amended.

FRANKLIN D. ROOSEVELT.

The White House, December 13, 1941.

H. MORGENTHAU, JR.,
*Secretary of the Treasury.*
FRANCIS BIDDLE,
*Attorney General of the United States.*

(F. R. Doc. 41-9402; Filed, December 15, 1941; 11:10 a.m.)"

DELEGATION OF AUTHORITY OF FEBRUARY 12, 1942

"The White House,
"Washington, February 12, 1942.

"Memorandum to the Secretary of the Treasury: All power and authority conferred upon me by Sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended, are hereby delegated to the Secretary of the Treasury.

FRANKLIN D. ROOSEVELT.

(F. R. Doc. 42-1582; Filed, February 23, 1942; 11:54 a. m.)"

GENERAL RULING No. 11

(7 F. R. 2168)

"Title 31—Money and Finance: Treasury

"Chapter I—Monetary Offices, Department of the Treasury

"Part 132—General Rulings Under Executive Order No. 8389, April 10, 1940, as Amended, and Regulations Issued Pursuant Thereto

"GENERAL RULING No. 11 UNDER EXECUTIVE ORDER No. 8389, AS AMENDED, AND REGULATIONS ISSUED PURSUANT THERETO, RELATING TO FOREIGN FUNDS CONTROL

"March 18, 1942.

"§ 132.11 General Ruling No. 11. (a) No license or other authorization now outstanding or hereafter issued, unless expressly referring to this general ruling, shall be deemed to authorize any transaction which, directly or indirectly, involves any trade or communication with an enemy national.

"(b) As used in this general ruling and in any other rulings, licenses, instructions, etc.:

"(i) The Government of any country against which the United States has declared war (Germany, Italy and Japan) and the Governments of Bulgaria, Hungary and Rumania and any agent, instrumentality or representative of the foregoing Governments, or other person acting therefor, wherever situated (including the accredited representatives of other Governments to the extent, and only to the extent, that they are actually representing the interests of the Governments of Germany, Italy and Japan and Bulgaria, Hungary and Rumania); and

"(ii) The government of any other blocked country having its seat within enemy territory, and any agent, instrumentality, or presentative thereof, or other person acting therefor, actually situated within enemy territory; and

"(iii) Any individual within enemy territory and any partnership, association, corporation or other organization to the extent that it is actually situated within enemy territory; and

"(iv) Any person whose name appears on The Proclaimed List of Certain Blocked Nationals and any other person acting therefor.

"(2) The term 'enemy territory' shall mean the following:

"(i) The territory of Germany, Italy and Japan; and

"(ii) The territory controlled or occupied by the military, naval or police forces or other authority of Germany, Italy or Japan.

"The territory so controlled or occupied shall be deemed to be the territory of Albania; Austria; that portion of Belgium within continental Europe; Bulgaria; that portion of Burma occupied by Japan; that portion of China occupied by Japan; Czechoslovakia; Danzig; that portion of Denmark within continental Europe; Estonia; that portion of France within continental Europe occupied by Germany or Italy; French Indo-China; Greece; Hong Kong; Hungary; Latvia; Lithuania; Luxembourg; British Malaya; that portion of the Netherlands within continental Europe; that portion of the Netherlands East Indies occupied by Japan; Norway; that portion of the Philippine Islands occupied by Japan; Poland; Rumania; San Marino; Thailand; that portion of the Union of Soviet Socialist Republics occupied by Germany; Yugoslavia; and any other territory controlled or occupied by Germany, Italy or Japan.

"(3) The term 'The Proclaimed List of Certain Blocked Nationals' shall mean 'The Proclaimed List of Certain Blocked Nationals' as amended and supplemented, promulgated pursuant to the President's Proclamation of July 17, 1941.

"(4) The term 'trade or communication with an enemy national' shall mean the sending, taking, bringing, transportation, importation, exportation, or transmission of, or the attempt to send, take, bring, transport, import, export or transmit

"(i) Any letter, writing, paper, telegram, cablegram, wireless message, telephone message or other communication of any nature whatsoever, or

"(ii) Any property of any nature whatsoever, including any goods, wares, merchandise, securities, currency, stamps, coin, bullion, money, checks, drafts, proxies, powers of attorney, evidences of ownership, evidences of indebtedness, evidences of property, or contracts directly or indirectly to or from an enemy national after March 18, 1942.

"(c) This general ruling shall not be deemed to affect any outstanding specific license in so far as such license expressly authorizes any transaction which involves trade or communication with any person whose name appears on The Proclaimed List of Certain Blocked Nationals.

"(d) Any transaction prohibited by section 3(a) of the Trading with the Enemy Act, as amended, is licensed thereunder unless such transaction is prohibited pursuant to section 5(b) of that Act and not licensed by the Secretary of the Treasury. In this connection, attention is directed to the General License under section 3(a) of the Trading with the Enemy Act, issued by the President on December 13, 1941. (Sec. 5(b), 40 Stat. 415 and 966; Sec. 2, 48 Stat. 1; 54 Stat. 179; Pub. No. 354, 77th Cong., 55 Stat. 838; E. O. 8389, Apr. 10, 1940, as amended by E. O. 8785, June 14, 1941, E. O. 8832, July 26, 1941, E. O. 8963, Dec. 9, 1941, and E. O. 8998, Dec. 26, 1941; Regs., Apr. 10, 1940, as amended June 14, 1941, and July 26, 1941.)

[SEAL.] E. H. FOLEY, JR.,
*Acting Secretary of the Treasury.*

(F. R. Doc. 42-2383; Filed, March 19, 1942; 11:24 a. m.)"

AMENDMENT TO GENERAL RULING 11

"Appendix A—General Rulings Under Executive Order No. 8389, April 10, 1940, as Amended, and Regulations Issued Pursuant Thereto.

"TRADE OF COMMUNICATION WITH AN ENEMY NATIONAL

"September 3, 1943.

"General Ruling No. 11, as amended under E. O. 8389, as amended, E. O. No. 9193, sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended by the First

War Powers Act, 1941, relating to Foreign Funds Control.

"General Ruling No. 11 is hereby amended to read as follows:

"*Regulations relating to trade or communication with or by an enemy national—(1) Trade and communication with an enemy national prohibited.* Unless authorized by a license expressly referring to this general ruling, no person shall, directly or indirectly, enter into, carry on, complete, perform, effect, or otherwise engage in, any trade or communication with an enemy national, or any act or transaction which involves, directly or indirectly, any trade or communication with an enemy national.

"(2) *Acts and transactions by an enemy national prohibited.* Unless authorized by a license expressly referring to this general ruling, no enemy national who is within the United States shall, directly or indirectly, enter into, carry on, complete, perform, effect, or otherwise engage in, any financial business, trade, or other commercial act or transaction.

"(3) *Certain transactions licensed under section 3(a).* Every act or transaction prohibited by section 3(a) of the Trading with the Enemy Act, as amended, is hereby licensed thereunder unless such act or transaction is prohibited by paragraph (1) or paragraph (2) hereof or otherwise prohibited pursuant to section 5(b) of that Act and not licensed by the Secretary of the Treasury. Attention is directed to the fact that the General License under section 3(a) of the Act, issued by the President on December 13, 1941, does not license any act or transaction not authorized hereunder.

"(4) *Definitions.* As used in this general ruling and in any other rulings, licenses, instructions, etc.:

"(a) The term 'enemy national' shall mean the following:

"(i) The Government of any country against which the United States has declared war (Germany, Italy, Japan, Bulgaria, Hungary, and Rumania) and any agent, instrumentality, or representative of the foregoing Governments, or other person acting therefor, wherever situated (in-

cluding the accredited representatives of other governments to the extent, and only to the extent, that they are actually representing the interests of the Governments of Germany, Italy, and Japan and Bulgaria, Hungary, and Rumania);

"(ii) The government of any other blocked country having its seat within enemy territory, and any agent, instrumentality, or representative thereof, or other person acting therefor, actually situated within enemy territory;

"(iii) Any individual within enemy territory, except any individual who is with the armed forces of any of the United Nations in the course of his service with such forces or who is accompanying such armed forces in the course of his employment by any of the Governments of the United Nations or organizations acting on their behalf;

"(iv) Any partnership, association, corporation or other organization to the extent that it is actually situated within enemy territory;

"(v) Any person whose name appears on The Proclaimed List of Certain Blocked Nationals, and any person to the extent that he is acting, directly or indirectly, for the benefit or on behalf of any such person: *Provided*, That no person so acting shall be deemed to be an enemy national if he is acting pursuant to license issued under the order or expressly referring to this general ruling; and

"(vi) Any person to the extent that he is acting, directly or indirectly, for the benefit or on behalf of an enemy national (other than a member of the armed forces of the United States captured by the enemy) if such enemy national is within any country against which the United States has declared: *Provided*, That no person so acting shall be deemed to be an enemy national if he is acting pursuant to license issued under the order or expressly referring to this general ruling.

"(b) The term 'enemy territory' shall mean the following:

"(i) The territory of Germany, Italy, Japan, Bulgaria, Hungary, and Rumania; and

"(ii) The territory controlled or occupied by the mili-

tary, naval, or police forces or other authority of Germany, Italy, or Japan.

"The territory so controlled or occupied shall be deemed to be the territory of Albania; Austria; that portion of Belgium within continental Europe; Bulgaria; that portion of Burma occupied by Japan; that portion of China occupied by Japan; Czechoslovakia; Danzig; that portion of Denmark within continental Europe; Estonia; that portion of France within continental Europe, including Monaco and Corsica; French Indo-China; Greece; Hong Kong; Hungary; Latvia; Lithuania; Luxembourg; British Malaya; that portion of the Netherlands within continental Europe; that portion of the Netherlands East Indies occupied by Japan; Norway; that portion of the Philippine Islands occupied by Japan; Poland; Rumania; San Marino; Thailand; that portion of the Union of Soviet Socialist Republics occupied by Germany; Yugoslavia; and any other territory controlled or occupied by Germany, Italy or Japan.

"(c) The term 'The proclaimed list of certain blocked nationals' shall mean The Proclaimed List of Certain Blocked Nationals, as amended and supplemented, promulgated pursuant to the President's Proclamation of July 14, 1941.

"(d) The term 'trade or communication with any enemy national' shall mean any form of business or commercial communication or intercourse with an enemy national after March 18, 1942, including, without limitation, the sending, taking obtaining, conveying, bringing, transporting, importing, exporting, or transmitting, or the attempt to send, take, obtain, convey, bring, transport, import, export, or transmit.

"(i) Any letter, writing, paper, telegram, cablegram, wireless message, telephone message, or other communication, whether oral or written, of a financial, commercial, or business character; or

"(ii) Any property of any nature whatsoever, including any goods, wares, merchandise, securities, currency, stamps, coin, bullion, money, checks, drafts, proxies, pow-

ers of attorney, evidences of ownership, evidences of indebtedness, evidences of property, or contracts;

directly or indirectly to or from an enemy national after March 18, 1942; *Provided, however,* That with respect to any government or person becoming an enemy national after March 18, 1942, the date upon which such government or person became an enemy national shall be substituted for the date March 18, 1942.

"(Sec. 3(a), 40 Stat. 412; Sec. 5(b) 40 Stat. 415 and 966; Sec. 2, 48 Stat. 1; 54 Stat. 179; 55 Stat. 838; E. O. 8389, April 10, 1940, as amended by E. O. 8785, June 14, 1941, E. O. 8832, July 26, 1941, E. O. 8963, Dec. 9, 1941, and E. O. 8998, Dec. 26, 1941; E. O. 9193, July 6, 1942; Regulations, April 10, 1940, as amended June 14, 1941, and July 26, 1941.

RANDOLPH E. PAUL,
(SEAL.) *Acting Secretary of the Treasury.*

(F. R. Doc. 43-14452; Filed, September 3, 1943; 4:02 p.m.)"

## Treasury Department

### FOREIGN FUNDS CONTROL

### May 25, 1945

### General Ruling No. 18

Under Executive Order No. 8389, as Amended, Executive Order No. 9193, Sections 3(a) and 5(b) of the Trading With the Enemy Act, as Amended by the First War Powers Act, 1941, Relating to Foreign Funds Control

### Regulations Relating to the Philippine Islands

(1) *Status of the Philippine Islands under the freezing regulations.* For the purpose of administering the freezing regulations and complying with the provisions thereof:

(a) The liberated portions of the Philippine Islands hereafter shall be included within the term "United States" as defined in paragraph B of section 5 of the

Order and shall not be included within the term "foreign country" as defined in paragraph D of section 5 of the Order;

(b) Any portions of the Philippine Islands controlled or occupied by the military, naval or police forces or other authority of Japan shall immediately upon liberation thereof be included within the term "United States" and shall cease to be included within the term "foreign country".

(2) *Status of Philippine nationals and property of Philippine nationals under the freezing regulations.* For the purpose of administering the freezing regulations and complying with the provisions thereof:

(a) The definition of the term "national" as specified in paragraph E of section 5 of the Order shall continue to apply with respect to the Philippine Islands as though the Philippine Islands in its entirety were a "foreign country" separately designated in the Order and specifically named in section 3 thereof, and the effective date of the Order as applied to the Philippine Islands were January 1, 1942. Any person who by virtue of such definition is a national of the Philippine Islands shall, unless licensed as a generally licensed national, continue to be deemed a national of a blocked country, namely, the Philippine Islands, and the status of such person as a national of a blocked country shall not be affected by the provisions of paragraph (1) hereof, or by the complete liberation of the Philippine Islands.

(b) Any person situated within the liberated portions of the Philippine Islands who is not a national of any blocked country other than the Philippine Islands shall be deemed to be a generally licensed national, *provided, however*, that this subparagraph shall not be deemed to authorize any payment, transfer, or withdrawal, or other dealing, with respect to:

(i) Any property situated, held, or maintained in any part of the United States other than the liberated

portions of the Philippine Islands in which on the date hereof any such person has any interest; or

(ii) Any income from such property accruing on or after the date hereof.

(c) General Licenses Nos. 28, 42 and 80 shall not be deemed to license as a generally licensed national any person within the liberated portions of the Philippine Islands.

(3) *Exportations of certain types of property from the liberated portions of the Philippine Islands prohibited.* Unless authorized by a license or other authorization expressly referring to this general ruling, the sending, taking, transmitting, or otherwise exporting of any (i) gold or silver coin or bullion, (ii) currency, (iii) securities, (iv) checks, drafts, bills of exchange, promissory notes, payment instructions, transfer orders, or other financial instruments, (v) powers of attorney or other authorizations or instructions to effect financial or property transactions, or (vi) other evidence of indebtedness or evidences of ownership of property, from the liberated portions of the Philippine Islands to any other part of the United States or to any foreign country is hereby prohibited.

(4) *General Ruling No. 10 not applicable in the liberated portions of the Philippine Islands.* The provisions of General Ruling No. 10 shall not be applicable in the liberated portions of the Philippine Islands.

(5) *Special provisions relating to the administration of the freezing regulations in the liberated portions of the Philippine Islands.* For the purpose of administering the freezing regulations in the liberated portions of the Philippine Islands and complying with the provisions thereof:

(a) There is hereby established a Philippine Office of Foreign Funds Control, at the head of which shall be a United States Treasury Representative designated by the Secretary of the Treasury. Such office shall be charged with the administration of the freezing regulations in the liberated portion of the Phillippine Islands.

(b) Subject to such regulations, rulings and instructions as the Secretary of the Treasury may from time to time prescribe, the United States Treasury Representative at the head of the Philippine Office of Foreign Funds Control is hereby authorized and empowered to exercise and perform in the liberated portions of the Philippine Islands all authority, duties and functions which the Secretary of the Treasury is authorized or required to exercise or perform under Sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended, and any executive orders, proclamations, regulations or rulings that have been or may be issued thereunder.

(6) *Definitions.* As used herein:

(a) The term "liberated portions of the Philippine Islands" shall mean the portions of the Philippine Islands not controlled or occupied by the military, naval or police forces or other authority of Japan.

(b) The term "freezing regulations" shall mean the Order, and the regulations, rulings, licenses, instructions, etc., issued by or at the direction of the Secretary of the Treasury pursuant to the Order or Sections 3(a) or 5(b) of the Trading with the Enemy Act, as amended.

HENRY MORGENTHAU, JR.,
*Secretary of the Treasury.*

Treasury Department

FOREIGN FUNDS CONTROL

August 31, 1946

## Amendment to General Ruling No. 18

Under Executive Order No. 8389, as Amended, Executive Order No. 9193, as Amended, Sections 3(a) and 5(b) of the Trading With the Enemy Act, as Amended by the First War Powers Act, 1941, Relating to Foreign Funds Control

General Ruling No. 18 is hereby amended to read as follows:

### Regulations Relating to the Philippines

(1) *Status of the Philippines.* For the purpose of administering and complying with the provisions of Sections 3(a) and 3(c) of the Trading with the enemy Act, as amended, Executive Order No. 8389, as amended, and the regulations, rulings, instructions and licenses issued by or under the direction of the Secretary of the Treasury pursuant to Executive Orders No. 8389 and 9095, as amended, the Philippines shall not be included within the term "United States" but shall be deemed to be a foreign country not designated in Executive Order No. 8389, as amended, and to be included in the "generally licensed trade area" as defined in General License No. 53.

(2) *Effect of previous status.* No person shall be deemed a national of a blocked country solely by reason of the fact that at any time on or since the effective date of the Order the Philippines were regarded as a blocked country.

(3) *Waiver of General Ruling No. 5 on importations of securities and currency from the Philippines.* The provisions of General Ruling No. 5 shall not apply to securities or currency sent, mailed, imported or otherwise brought into the United States from the Philippines, unless there is reasonable cause to believe that such securities or currency are

being brought into the United States via the Philippines from any other foreign country.

E. H. FOLEY, JR.,
*Acting Secretary of the Treasury.*

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## APPENDIX D

### TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF THE PHILIPPINES

Article VI of the Treaty of General Relations Between the United States of America and the Republic of The Philippines, dated July 4, 1946, effective from October 22, 1946 (Treaties and Other International Acts Series 1568, Department of State Publication 2712) provides:

> "In so far as they are not covered by existing legislation, all claims of the Government of the United States of America or its nationals against the Government of the Republic of the Philippines and all claims of the Government of the Republic of the Philippines and its nationals against the Government of the United States of America shall be promptly adjusted and settled by mutual agreement, and all existing property rights of citizens and corporations of the United States of America in the Republic of the Philippines and of citizens and corporations of the Republic of the Philippines in the United States of America shall be acknowledged, respected and safeguarded to the same extent as property rights of citizens and corporations of the Republic of the Philippines and of the United States of America respectively. Both Governments shall designate representatives who may in concert agree on measures best calculated to effect a satisfactory and expeditious disposal of such claims as may not be covered by existing legislation."

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# In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 382

FLAVIANA TAN, WIDOW OF ANICETO BERNAL, IN HER OWN RIGHT, AND AS NATURAL GUARDIAN OF HER MINOR CHILDREN, JOSE BERNAL, FIDEL BERNAL, EMILIANA BERNAL AND MILAGROS BERNAL, BY HER LAWFUL HUSBAND, ANICETO BERNAL, PETITIONERS

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (R. 8–10) is reported at 102 F. Supp. 552.

### JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1952 (R. 10). Pursuant to a motion made on March 5, 1952, the Court of Claims, by order dated March 7, 1952, extended

the time within which to file a motion for a new trial to and including May 5, 1952.[1] Petitioner's motion for a new trial, filed on May 2, 1952 (R. 11), was denied on July 15, 1952, without opinion (R. 13). The petition for a writ of certiorari was filed on October 7, 1952. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1255 (1).

## QUESTIONS PRESENTED

In this suit, filed on August 14, 1951, compensation is sought for materials requisitioned in the Philippine Islands during the period from October 1 to November 3, 1941. The question whether the suit was barred by the six-year statute of limitations (28 U. S. C. 2501, *infra*, p. 3), as the Court of Claims held, turns on the answers to the following questions:

1. Whether the cause of action accrued when the property was taken or whether it accrued only after rejection of petitioner's claim by the Army Claims Service.

2. Whether the statute of limitations, held by the Court of Claims to have been suspended during World War II, began to run again on September 2, 1945, when Japan surrendered, or on some later date, as petitioner contends.

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[1] Petitioner's motion and the order of the court below have not been included in the printed record.

## STATUTES INVOLVED

28 U. S. C. 2501, pars. 1 and 3, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.
>
> * * * * *
>
> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.
>
> * * * * *

Section 2 (a) of Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. 2 (a) provides in pertinent part:

> SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, * * *.

## STATEMENT

This case was decided by the Court of Claims upon the petition and a motion to dismiss for

lack of jurisdiction. The salient facts, as alleged in the petition, may be summarized as follows:

In the fall of 1941, a large number of camps was built by the United States Army in the Philippine Islands in order to accommodate the reservists of the Philippine Army who had been called back to active duty. In connection with this program, the engineer in charge of the construction of a camp in Santo Tomas, Batangas Province, in Luzon, requisitioned all the stocks of lumber and other construction materials belonging to Aniceto Bernal, who operated a lumberyard nearby. (R. 2.) Delivery of the requisitioned materials was made between October 1 and November 3, 1941 (R. 2). Payment, however, was not made prior to the occupation of the Philippines by the Japanese forces (R. 2–3).

Bernal was killed by members of the Japanese army in February, 1945 (R. 1). On or about March 31, 1948, petitioner, Bernal's widow, as his surviving spouse and as the natural guardian of their minor children (R. 3), filed a claim for the requisitioned property with the Claims Service of the United States Army. This claim was rejected on or about June 11, 1949, for failure to submit satisfactory proof (R. 3).

Petitioner filed her complaint seeking compensation for the requisitioned materials in the Court of Claims on August 14, 1951 (R. 1). The Court of Claims held that petitioner's cause of

action had accrued no later than November 3, 1941, that the statute of limitations, suspended from December 8, 1941, until September 2, 1945, had run against the claim on July 30, 1951, and that the complaint consequently was barred by the statute of limitations (R. 8–9). A motion for a new trial was overruled (R. 13).

## ARGUMENT

This action, based upon the requisitioning of property in the Philippines prior to Pearl Harbor (R. 3–4), was filed on August 14, 1951, *i. e.*, nearly ten years after the taking occurred, more than six years after the restoration on April 16, 1945, of commercial mail service between the United States and Manila and after General MacArthur's and President Osmena's Proclamations of July 5, 1945, announcing the complete liberation of the Philippine Islands.[2] Petitioner argues that her cause of action did not accrue at the time of the taking, but only when her claim was rejected in June 1949, by the Army Claims Service, to which she had submitted it on March 31, 1948 (R. 3)—over six years after the taking had occurred and approximately three years after the liberation of Batangas Province. She claims in the alternative that the statute of limitations remained suspended for a period far exceeding the actual occupation of the Philippines Islands by

[2] Cf. *Marcos* v. *United States*, 102 F. Supp. 547, 549, rehearing denied, 106 F. Supp. 172, 178–179 (C. Cls.).

the Japanese armed forces. We submit that the court below reached the correct result, that there is no conflict, and that further review is unnecessary.

1. Pursuant to 28 U. S. C. 2501, the Court of Claims has no jurisdiction over petitions filed more than six years after the accrual of the cause of action. The complaint in the instant case is based upon the requisitioning of property (R. 2). It is well settled that in such cases the cause of action accrues at the time of the taking or the time of the delivery of the property to the United States. *United States* v. *Dickinson,* 331 U. S. 745; *United States* v. *North American Co.,* 253 U. S. 330; *United States* v. *Berdan Fire-Arms Co.,* 156 U. S. 552, 570–572.

Petitioner asserts that her cause of action accrued only on June 11, 1949, when her claim was rejected by the Army Claims Service. She does not refer, however, to any statute which required the submission of her claim to the Claims Service before she could sue in the Court of Claims, or which provided that she could sue in that court only following an award by the Claims Service with which she was dissatisfied,[3] nor are we aware of any such statute. It is established that the existence of an optional opportunity for the ad-

[3] The Government's position in cases of this type is that a cause of action accrues from the date of the factual injury to the claimant, not from the date of denial of administrative relief, unless a statute makes the latter a legal prerequisite to

ministrative settlement of a claim does not prevent a claimant from immediately pursuing his judicial remedy in the Court of Claims. *United States* v. *Clyde,* 13 Wall. 35; *Smithmeyer* v. *United States,* 147 U. S. 342, 357–358. And conversely it has been held that the availability of such optional means of administrative adjustment does not suspend the running of the statute of limitations. *Howard University* v. *Cassell,* 126 F. 2d 6, 9–10 (C. A. D. C.), certiorari denied, 316 U. S. 675; *United States* v. *Utz,* 80 Fed. 848 (C. A. 3); *Battelle* v. *United States,* 7 C. Cls. 297; *Southern Pacific Co.* v. *United States,* 67 C. Cls. 414, 422, certiorari denied, 280 U. S. 567; *Moriarty* v. *United States,* 97 C. Cls. 338, 340; *Ylagan* v. *United States,* 101 C. Cls. 294; *L. E. Myers Co.* v. *United States,* 105 C. Cls. 459, 478.

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further proceedings. See *McMahon* v. *United States,* 342 U. S. 25. In *Schaeffer* v. *United States,* 114 C. Cls. 568, certiorari denied, October 20, 1952, No. 232, this Term, the Government's position was that the administrative procedure was not a statutory prerequisite, but the Court of Claims took a different view. In *Lance, Inc.* v. *United States,* 190 F. 2d 204 (C. A. 4), certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915, *United States* v. *Lovknit Manufacturing Co., Inc.,* 189 F. 2d 454 (C. A. 5), certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915, and *United States* v. *Unexcelled Chemical Corp.,* 196 F. 2d 264 (C. A. 3), certiorari granted, October 27, 1952, No. 293, this Term, the Government contends that the administrative proceeding is a prerequisite to judicial enforcement of the Walsh-Healey Act. In *Pillsbury* v. *United Engineering Co.,* 342 U. S. 197, the Government contended unsuccessfully that the injury did not occur until the claimant was disabled.

Petitioner's contrary view, uniformly rejected by the courts, would give to a claimant the power indefinitely to postpone the operation of the statute by delaying the filing of his claim with the administrative agency. Cf. *McMahon* v. *United States,* 342 U. S. 25, 27; *Pillsbury* v. *United Engineering Co.,* 342 U. S. 197, 200.

The cases cited on pages 8–14 of the petition do not hold to the contrary. The majority of them stand for the proposition that in certain situations a cause of action may accrue only after a demand has been made; they do not detract from the long-established rule that in the case of requisitioning of property the cause of action accrues at the time of the taking and a demand is unnecessary.[4]

*Dino* v. *United States,* 119 C. Cls. 307, decided the very limited issue that a completed form re-

[4] *B-W Construction Co.* v. *United States*, 100 C. Cls. 227, merely holds that the parties to a construction contract may provide by express stipulation that the contractor's claim for compensation shall accrue only upon the presentation of the final vouchers. Such agreements, however, are considered unusual and, hence, are not readily presumed. *Moriarty* v. *United States*, 97 C. Cls. 338. The following cases petitioner cites have even less bearing on the issues this case presents: *United States* v. *Clark*, 96 U. S. 37; *United States* v. *Smith*, 105 U. S. 620; and *Scott* v. *United States*, 18 C. Cls. 1, involve suits by disbursing officers for relief from responsibility for loss, pursuant to 28 U. S. C. 1496, and hold that this cause of action (or rather opportunity to establish a defense, *cf. United States* v. *Clark*, *supra*, at 43) accrues, not at the time loss occurs, but only when the officer is held

questing compensation in Philippine pesos for property allegedly furnished to the Philippine Guerilla Forces, filed with the Court of Claims rather than with the appropriate Army authorities, did not state facts sufficient to constitute a cause of action. As the Court of Claims pointed out, the form Dino filed was insufficient to show either a contract of sale or a taking of his property, for it stated no contract terms and gave neither the name nor any indication of the authority of the alleged procurement official to bind the United States. The court held that since the filed document disclosed that Dino had never demanded payment, the pleading did not even show that any supposed contract had ever been breached. *United States* v. *Dickinson,* 331 U. S. 745, and *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, which are also invoked in the petition, are even farther afield. The former decision merely holds that a claim for just compensation under the Fifth Amendment should not be defeated by a hypertechnical determination of the

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accountable for the loss, or when he pays the deficiency. *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, stands for the analogous proposition that a cause of action for the refund of an overcharge accrues only when the overcharge is exacted and not when it becomes due. *United States* v. *Taylor,* 104 U. S. 216, holds that the surplus obtained upon a tax sale constitutes a trust fund; and, hence, that the statute of limitations governing an action to recover such a surplus begins to run only on demand.

time of the accrual of the claim. The decision below, far from being hypertechnical, resolves every arguable legal or factual issue in petitioner's favor.[5] The latter case merely points out the constitutional difficulties which would arise if the Court of Claims were closed to an owner of requisitioned property because he was an alien; petitioner, however, was afforded more than ample time to submit her claim to courts which were open to her for a total of well over six years.[6]

2. The Court of Claims, holding that its statute of limitations was suspended on suits by Filipinos during World War II, has applied in this case its rule that the period of suspension ended on September 2, 1945, the day the Japanese formerly surrendered, rejecting the Government's contentions that one or more earlier dates following liberation of the Philippines should have been selected.

[5] The court below held that the statute began to run at the time when the United States took the delivery of the requisitioned property and not on the earlier date when Bernal was advised that his property had been commandeered. The holding that the suspension of the statute of limitations lasted until September 2, 1945, and not at an earlier date in 1945 (see note 7, p. 11, *infra*), was likewise favorable to petitioner.

[6] The appeals to the Court's sympathy in view of Bernal's sacrifices for the cause of the United States and to the possible effect this decision might have on future relations with the Republic of the Philippines disregard the jurisdictional character of 28 U. S. C. 2501, which cannot be waived by any government official (*Finn* v. *United States*, 123 U. S. 227, 232–233; cf. *Munro* v. *United States*, 303 U. S. 36),

See *Marcos* v. *United States,* 102 F. Supp. 547, rehearing denied, 106 F. Supp. 172 (C. Cls.).[7] Petitioner contends, however, that even this generous rule is insufficient and that some longer period of suspension should have been adopted because "hostilities" had not been terminated by September 2, 1945.

But petitioner's inability to resort to United States courts, which is the basis for suspending the

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and the consideration that a waiver of sovereign immunity must be strictly construed in favor of the United States (*McMahon* v. *United States*, 342 U. S. 25, 27). Such appeals might appropriately be presented to Congress.

[7] The suggestion (Pet. 7–8) that the same "fundamental questions" arise here as in the *Marcos* case, and that the present petition should therefore be granted, is plainly misconceived. Acceptance of the Government's views in *Marcos* [(1) that the period of suspension ended earlier in 1945 than September 2, and (2) that, following the end of the suspension period, a plaintiff had only three years under 28 U. S. C. 2501, *supra*, p. 3, not six years, in which to sue] would simply afford additional grounds for the result reached by the Court of Claims in this case. The fact that the rulings of the *Marcos* case, favorable to the present petitioner, may be wrong would show at most that the issue presently under discussion should not even have been reached for consideration by the Court of Claims. This scarcely enhances the argument that the issue warrants review by this Court.

Of course, if the present petition is granted, the Government will urge, as additional, or perhaps primary, grounds for the decision below, the arguments made in *Marcos*, including the argument that under 28 U. S. C. 2501, the statute of limitations would run only for three years from the end of the period of suspension. This latter argument, rejected by the Court of Claims in *Marcos*, affects about 50 cases now pending in that court. If it were thought likely that the Court would reach this point in the instant case, the Gov-

statute of limitations, resulted from the circumstance that the Philippine Islands were occupied by the military forces of Japan. This disability ended by September 2, 1945 (if not sooner), since by that time all of the Philippines were freed from enemy control. Her technical status as an "enemy" (Trading with the Enemy Act, Section 2 (a), *supra*, p. 3) lasted only during the period of the Japanese occupation.[8] Her enemy status did not persist until the war had been officially terminated,[9] but ended when the Japanese vacated the area in which she resided. *Drewry* v. *Onassis*, 188 Misc. (N. Y.) 912, affirmed, 272 App. Div. 870, leave to appeal denied, 272 App. Div. 960; *Chuchuru* v. *Chutchurru*, 185 F. 2d 62 (C. A. 10); *cf. United States* v. *Rice*, 4 Wheat. 246, 254; *United States* v. *Hayward*, 2 Gall. 483, 501, 26 Fed. Cas. 240, 246 (C. C. D. Mass.).[10]

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ernment would, accordingly, not oppose the instant petition. However, because the determination that the period of suspension of the statute of limitations ended on September 2, 1945, disposes of the instant case, and because we think the result of this determination is clearly correct as to the present petitioners (though we believe the date should be even earlier than September 2, 1945), it seems unnecessary to reach the more important *Marcos* issue here.

[8] Until 1946 petitioner was a national of the United States, Nationality Act of 1940, Sec. 204 (a), 54 Stat. 1137, 1139, 8 U. S. C. 604 (a). Cf. *Cabebe* v. *Acheson*, 183 F. 2d 795 (C. A. 9).

[9] Cf. *Ludecke* v. *Watkins*, 335 U. S. 160.

[10] In her specification of errors petitioner asserts (Pet. 6–7) that the Court of Claims erred in not holding that the

## CONCLUSION

The decision below is correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
*Acting Solicitor General.*
HOLMES BALDRIDGE,
*Assistant Attorney General.*
PAUL A. SWEENEY,
HERMAN MARCUSE,
*Attorneys.*

NOVEMBER 1952.

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statute of limitations was suspended as long as the transfer of funds from the Philippine Islands to the United States was subject to a license. If this point, not supported by any argument, were correct, the statute of limitations would be suspended with respect to most foreign claimants, in view of the existence of exchange control legislation in a large number, possibly the majority, of foreign countries. Moreover, these licensing provisions, the only adverse effect of which upon petitioner would have been the need for a permit in order to pay the $10.00 filing fee in the Court of Claims, were lifted 18 months before petitioner even submitted her claim to the Army Claims Service.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

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No. 382

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FLAVIANA TAN, Widow of Aniceto Bernal, in Her Own Right, and as Natural Guardian of Her Minor Children, Jose Bernal, Fidel Bernal, Emiliana Bernal and Milagros Bernal, by Her Lawful Husband, ANICETO BERNAL,
*Petitioners,*

v.

THE UNITED STATES.

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## REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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### INTRODUCTION

Upon the filing of the Petition for a Writ of Certiorari, counsel for petitioners addressed a letter to the Acting Solicitor General of the United States (App. 2), and later to the Attorney General of the United States, requesting the United States not to oppose the Petition for a Writ of Certiorari. After the exchange of letters a conference was held and the request, while not denied (App. 2) was, in effect, denied by the filing of a Brief in Opposition, *except* for the concession

made in *Footnote 7, page 11*, pertinent portions of which read, as follows:

> "The suggestion (Pet. 7-8) that the same '*fundamental questions*' *arise here* as in the *Marcos* case, and that the present petition should therefore be granted, *is plainly misconceived.* * * * ."
>
> "Of course, *if the present petition is granted, the Government will urge,* as additional, or perhaps *primary,* grounds for the decision below, the arguments made in *Marcos, including the argument* that under 28 U.S.C. 2501, the statute of limitations would run only for three years from the end of the period of suspension. *This latter argument, rejected by the Court of Claims in Marcos, affects about 50 cases now pending in that court. If it were thought likely that the Court would reach this point in the instant case, the Government would, accordingly, not oppose the instant petition.* However, because the determination that the period of suspension of the statute of limitations ended on September 2, 1945, disposes of the instant case, and because we think the result of this determination is clearly correct as to the present petitioners (though we believe the date should be even earlier than September 2, 1945), *it seems unnecessary to reach the more important Marcos issue here.* (Italics supplied.)

It is obvious from the foregoing footnote and the known facts (App. 2) that the Government intends to file a Petition for a Writ of Certiorari in the *Marcos* and other similar cases, and that were all questions to be determined by the subject case the United States would not oppose the granting of the petition in this case. Accordingly, a reply is required to apprise this Court more fully, if not done so in the petition, of the reasons why the petition should be granted in the subject case, regardless of whether or not the Court reaches the question considered of importance to the United States, as well as if the Court should do so, as all of the questions sought to be argued herein would be argued in the *Marcos* case.

## THE MARCOS AND TAN CASES

The *Marcos* and *Tan* cases were for the *first* time decided February 5, 1952 (102 F. Supp. 547).

In the *Marcos* case, under Point (1), the Court said:

> "Although this Statute does not mention war, we have had occasion in a recent case to consider the effect of war on the Statute of Limitations. * * *"

This question is involved in the *Tan* case.

Under Point (2), the Court said, in part:

> "* * * and where the cause of action accrues after war has commenced, the claimant is entitled to the full six-year period after the war's end within which to file suit. * * * Where the Statute has begun to run prior to the commencement of war it has been held that the claimant is also entitled to the full statutory period of six years, and that the exact period of the war's duration should be deducted in determining the day on which the bar of limitations arises. * * *"

The first quoted portion deals with the *Marcos* case; the second with the *Tan* case.

Under Point (3), the Court said, as follows:

* * * * *

> "The next problem confronting us is to determine the event which terminated the war and brought to a close the period of suspension of the Statute of Limitations. A number of dates and events have been presented for our consideration, in this case, and in the related cases of Tan v. U. S., Ct. Cl., 102 F. Supp. 552; Francisca De Guia and Beatriz B. Palmares, No. 50342; Paulino Lorenzo, No. 50357; and Raymundo F. Navarro, No. 50358; this day decided. We shall here discuss the various contentions urged in all five cases with regard to the lifting of the suspension of the Statute. * * *"

Very obviously the Court was considering the *Tan* case at the same time as the *Marcos* case on this point.

Under Points (4) and (5), the Court said:

> "The *logical date* to select as lifting the suspension of the Statute of Limitations under the circumstances of this case is the day of the formal surrender of the Japanese, September 2, 1945. It was on this occasion that the above-mentioned reasons for suspending the running of the Statute ceased to exist, inasmuch as commercial intercourse by the United States with the Philippine Islands was thereby restored, and likewise, access to this court by all Filipinos once again became possible. * * *" (Italics supplied.)

It is this "logical date" of September 2, 1945 which, in the opinion of the Court of Claims, foreclosed the petitioners herein before that Court. The date was applicable in both cases.

Under Point (6), the Court said, in part:

> "Plaintiff alleges that a similar right is granted to citizens of the United States under the provisions of Public Law No. 3083 of the Philippine Legislature, March 16, 1923, 18 P. L. of Philippines 169, which Act continues to be the law of the Philippine Republic. * * *"

The question of the right to sue in the Court of Claims is present in both cases.

The United States filed a petition for a rehearing in the *Marcos* case, and the petitioners herein filed a similar petition in the subject case. Both petitions were denied—that in the subject case without opinion, that in the *Marcos* case with opinion.

Every question raised in the opinion of July 15, 1952, the second opinion in the *Marcos* case (106 F. Supp. 172), was present in the subject case. That the subject case was in fact under consideration in the second decision in the *Marcos* case is evident from the following quotations from pages 177 and 179:

> "In urging the contention that war is a legal disability giving rise to only a three-year period following the re-

turn of peace within which to institute suit, defendant has disregarded the consequences of such a construction upon causes of action accruing prior to the start of war. The case of Tan v. United States, D. C., 102 F. Supp. 552, presents an example of such a situation. Plaintiff Tan's cause of action against the United States Army accrued on November 3, 1941, and the Statute of Limitations began to run against it at this time. War broke out in Manila on December 8, 1941. If we were to adopt defendant's contention and were to conclude that war is a legal disability, the outbreak of war would have no effect on Tan's cause of action because, as indicated above, once the Statute has begun to run, intervening legal disabilities do not give rise to an additional period of grace following the removal of the disability within which to bring suit. To reach such a conclusion, we would have to disregard the fact that resort to this court by Filipinos was both impossible and illegal during the period here in question. It is clear that defendant's argument is erroneous and is contrary to the more logical conclusion reached in the leading decisions which have considered this problem. We, therefore, reaffirm the principle adopted in our earlier decision in this case that war, unlike 'legal disabilities,' impliedly suspended the normal operation of the Statute of Limitations, and that with the return of peace, plaintiff, whose cause of action accrued after the outbreak of war, had six years within which to file his suit."

* * * * *

"Plaintiff has once again presented arguments concerning the further suspension of the Statute of Limitations during the pendency of his claim before the Army Claims Commission. Inasmuch as all of these arguments have been considered at length in our decision in a companion case to the present action, Tan v. United States, *supra*, there is no point in discussing them further. * * *"

The interrelationship of the two cases seems obvious.
(Record p. 8.)

## ALL CASES INVOLVED CAN BE DECIDED BY A DECISION IN THE SUBJECT CASE

### The Question of Importance to the United States

The primary question of seeming importance to the United States in both the *Marcos* and *Tan* cases (although all of the questions herein were argued and considered of importance below), was that the Statute of Limitations is three years and not six years, under 28 U.S.C. 2501. The two questions of primary importance to petitioners are (1) that the claim did not accrue and the Statute of Limitations did not begin to run until after demand for payment and refusal, June 11, 1949 —a question not decided by the Court of Claims except by implication, and (2) that the Statute of Limitations was suspended until a date beyond September 2, 1951, to wit: August 31, 1946, or December 31, 1946, or June 11, 1949.

All three questions are of importance. The United States, in footnote 7, page 11, Brief in Opposition, admits that about fifty cases involve the question considered of importance to it. The same may be said about question numbered 1, considered of importance by petitioners and other claimants, as that is present in all of these cases. If question numbered one, of importance to the petitioners, is decided favorably to petitioners, then the question considered of importance to the United States, in many cases, need not be decided. Similarly, if question numbered two, of importance to petitioners, is decided favorably to petitioners, then it becomes necessary to decide the question considered of importance by the United States. Thus, the question considered of importance to the United States *can and should* be decided in this case.

In all events, the specification of errors to be urged, contained at pages 6 to 7 of the Petition for a Writ of Certiorari, are so framed as to permit the argument of all three questions.

Indeed, the Government has admitted in footnote 7 that it will argue them, saying "if the present petition is granted, the

government will urge, *as additional, or perhaps primary, grounds* for the decision below, the *arguments made in Marcos,* including the argument that under 28 U.S.C. 2501, the statute of limitations would run only for three years from the end of the period of suspension." (Italics supplied.)

There is thus an admission of the Government that every question involved in the cases pending in the Court of Claims, of which there are many more than fifty, can be decided by a decision in the subject case, as well as in *Francisca De Guia, et als.* v. *The United States,* No. 386, October Term, 1952. If it is of importance to the Government in the remaining cases, it is important in the subject case, and it would be unfair to deny the petition in this case and later permit the United States to select its cases for hearing by this Court, all on technical grounds. (*United States* v. *Dickinson,* 331 U. S. 745.)

It should be remembered that, in all of these cases, the claim is that the United States actually received goods and services for the defense of the United States, had the benefit of them in an all-out war, and merely failed to pay for them. Payment has been demanded and refused and should not be refused by this Court except upon the most cogent grounds. *International Paper Co.* v. *United States,* 282 U. S. 399, 406.

**Petitioners' First Ground That the Claim Did Not Accrue Until Demand for Payment and Refusal**

Respondent, page 6 of Brief in Opposition, has said that, in the case of requisitioning property, "it is well settled that the cause of action accrues at the time of the taking or at the time of the delivery of the property to the United States." In support thereof the United States cites *United States* v. *Dickinson, supra; United States* v. *North American Co.,* 253 U. S. 330, and *United States* v. *Berdan Fire-Arms Co.,* 156 U. S. 552.

In the *Dickinson* case, there was involved the building of a dam by the United States and the flooding of the claimant's property. In that case the Court held that the taking of

property, flooded by waters enclosed by a dam built by the United States, *cannot,* until the consequences of the inundation are known, be so complete as to start the running of the Statute of Limitations against a right of action against the United States, either under the Constitution or on an implied contract, even though the owner might have brought suit when the dam was completed.

It is in this case that this Court used the language quoted by petitioner at page 9 of the petition, and it stands for exactly the opposite from that for which cited by the United States.

In the *North American Co.* case General Randall, a military commander, took land in Alaska for an Army post, including a placer mine, in July, *1900.* In December, *1908,* the Secretary of War, the only person authorized by Congress to establish such a post and determine what land should be taken, approved the action of General Randall. Suit was brought. The Statute of Limitations was held to run from the time of approval of the Secretary of War and *not* the taking of the land in 1900, although admittedly the land was taken in 1900, certainly so far as possession or use by the claimant was concerned.

The decision in that case supports the very positions of petitioner in the subject case, as in both cases there was an implied contract for payment at the time of the taking, but the cause of action *accrued* only later.

In the *Berdan Fire-Arms Co.* case, the Court held that, where there is *no contract,* but merely a patent infringement by the Government, which is only a tort, this does not give rise to a cause of action in the Court of Claims. It held that the Statute of Limitations is a bar to any recovery for use of a patent prior to six years before suit is brought and that a reasonable royalty is a question of fact to be determined by the Court of Claims and not subject to review unless there is clear error to be found in other findings of that Court. The decision in that case has no application to the subject case.

This is not a case involving "optional remedies" such as to

bring it within the decisions in *United States* v. *Clyde,* 13 Wall. 35, and *Smithmeyer* v. *United States,* 147 U. S. 342, p. 7, Brief in Opposition.

In those cases, there were acknowledged *disputes.* The Court held that the claimants there had the right to administrative relief but were not required to resort to it as a condition to suing in the Court of Claims. In the subject case, there was *no dispute,* as the United States had not yet received a demand for payment. When this demand was made and refused, only then did the dispute come into being, and the claim *then* accrued.

In the rush of November, 1941, to build cantonments and prepare for the invasion of the Philippines—when there was not even time for General MacArthur to get an appropriation from Congress so that the President provided funds—until the return of American troops and the restoration of a semblance of peace and civilized conditions, there was no time for a dispute. There was no one of whom to make claim for goods unpaid for until the Army Claims Service was set up to receive, hear and determine them. These demands of petitioners were then duly made, and upon their rejection suit was brought in the Court of Claims, August 14, 1951.

Nor are the cases relied upon (p. 7, Brief in Opposition, to the effect that the Statute of Limitations is not suspended while claims are pending in an administrative agency impelling. They are primarily decisions of the Court of Claims, whose decision is complained of in the subject case. This Court has never decided this question, neither generally nor on facts at all related to the claims of Filipinos for nonpayment by the United States Army on account of requisitions in the prosecution of War.

Other cases relied upon in footnote 3, pages 6 and 7 of the Brief in Opposition, are based upon the proposition that "a cause of action accrues from the date of the *factual injury* to the claimant, not from the date of denial of administrative

relief, unless a statute makes the latter a legal prerequisite to further proceedings." (Italics supplied.)

This position is acceptable to petitioners but confuses the actual position of petitioners.

Petitioners urge that there was no *factual injury* until payment was refused. In the subject case the goods were delivered upon order of the Government for the building of the cantonment at Santo Tomas under orders of General MacArthur. There was no question that Bernal would be paid, unless it was a gift, and there is no such suggestion. There was an implied promise, although no price nor date of payment had been fixed. When Bernal returned, the engineer who would have approved his vouchers was no longer there, due to Army orders. Bernal was killed by the Japanese. His widow presented her claim to the Army Claims Service. Factual injury occurred when her claim was refused, and not until then. That is when the claim accrued, not on the date assumed by the Court of Claims, November 3, 1941. That point was completely disregarded below.

**Petitioners' Second Ground That If the Claim Accrued November 3, 1941, the Statute of Limitations Was Suspended Beyond September 2, 1945.**

The second part of the quoted portion of Brief in Opposition (Footnote 3, pages 7 and 8) deals with the suspension of the Statute, i.e., whether the Statute is suspended when one seeks administrative relief, quite a different question from that of the date of accrual of the claim.

At this point, the United States calls attention to *McMahon* v. *United States*, 342 U. S. 25, 27, and *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 200.

The *McMahon* case dealt with an injured seaman who was required to bring suit *within two years after the cause of action arises*, and the Court held that the date of injury was the determining factor.

In the *Pillsbury* case, the Statute provided that the right for compensation for disability would be barred "unless a claim therefore is filed *within one year after the injury.*" (Italics supplied.)

In the first place, the Statutes are entirely different; and, in the second place, the injury to those claimants was upon a day certain. In the subject case, it could not be determined whether there was or was not injury, until the Army refused to pay in accordance with the implied contract, which it did June 11, 1949.

At pages 8 and 9 of Brief in Opposition, referring to *Dino* v. *United States,* 119 C. Cls. 307, the United States seeks to minimize the true meaning of the decision in that case. True, the form of the petition was inadequate, but the Court went further than mere form and held that the claimant there was first required to submit his claim to "proper officials of the War Department," (which in these cases was the Army Claims Service legally set up to hear the claims), before he could sue in the Court of Claims. That being so, the claim could not accrue until such a demand had been made and payment had been refused. There was no breach of contract until then.

The Court of Claims has held that, if the *law requires* seeking administrative relief, then the Statute is suspended, but if that is not required by the Statute, then seeking administrative relief does not toll the Statute. This Court has never passed upon this question squarely, and certainly should.

Where goods and services are supplied voluntarily upon request of the Government or are demanded by force of arms, there being an implied contract always that the supplier will be compensated, in either event, the Government should be given an opportunity to pay or to refuse payment. That was, in substance, the holding in the *Dino* case, *supra,* whether the Court was required to dismiss the case on other grounds, or not. It did not do so.

During the period when the Administrative Branch, which has made the *quasi* contract, is considering the case, the

Statute of Limitations should be held to be suspended. Where this Court has wanted to do so, it has, in substance, so held. *United States* v. *Clark*, 96 U. S. 37, *United States* v. *Taylor*, 104 U. S. 216, *United States* v. *Smith*, 105 U. S. 620. (Petition, pp. 8-11.)

### The Date September 2, 1945, Has No Basis in Fact or in Law

In the *Marcos* case, there was submitted to the Court of Claims, at its request for argument on the effect of the Trading with the Enemy Act upon the suspension of the Statute of Limitations, a memorandum from a person who was present in the Philippine Islands during the chaotic conditions after the surrender of Japan, September 2, 1945 (App. 1). This statement is not proof—it is purely a restatement of notorious facts to be found in many publications in the Library of Congress, of which this Court can very well take judicial notice. Certainly, the Filipinos, spread over the hundreds of islands, had no practical way of getting a petition to the Court of Claims prior to the end of 1946, and no way of paying the filing fee of $10.00, which is mandatory.

A filing fee of $10.00 had to accompany the petition. The Philippine National Bank did not open until July, 1946. The Secretary of the Treasury of the United States did not permit the transfer of funds from the Philippines to the United States until August 31, 1946. (App. C of Pet., p. 31.) Hostilities in some islands were just then ending. (App. 1.) True, Japan gave up its sovereignty on September 2, 1945, but there was no complete cessation of hostilities in fact until thereafter and no official ending until December 31, 1946. (App. 1 and App. B, Pet. p. 19).

In law, September 2, 1945, is erroneous. Under the Trading With The Enemy Act, certainly funds could not legally be transferred from the Philippines to the United States until August 31, 1946.

Furthermore, it was only on December 31, 1946, that the President of the United States proclaimed the cessation of hostilities of World War II. (App. B, Pet. p. 19.)

## CONCLUSION

The decision of the Court of Claims in the subject case was incorrect and the questions involved are of such general importance as to require a decision by this Court, whether or not the Court reaches the question the United States proposes to present upon a petition for writ of certiorari in the *Marcos* case, a year or two hence, after expensive trials of several cases.

Respectfully submitted,

PREW SAVOY,
*Counsel for Petitioners.*

GEORGE A. NUGENT,
H. H. MARTIN,
*Of Counsel.*

## APPENDIX 1

### Affidavit

ROGER E. BROOKS, being duly sworn, deposes and says as follows:

1. I am a citizen of the United States engaged in the practice of law in Washington, D. C., and Honolulu, Hawaii.

2. In February 1942 I was sent by the United States Comptroller of the Currency to Honolulu, Hawaii, to take over and liquidate all the Japanese banks in the Pacific area.

3. In 1943, while in Honolulu, I was appointed by the United States Alien Property Custodian as Manager of his Honolulu office, with the duty and responsibility of administering all enemy property subject to the Custodian's jurisdiction in the Pacific area.

4. In May 1945, on the instructions of the Alien Property Custodian, I proceeded to the Philippine Islands to determine whether there was in the Philippines sufficient enemy-owned property to justify the cost of establishing an office of the Office of Alien Property Custodian. I arrived in Manila by U. S. military plane in early May 1945 and proceeded to make the required survey to determine the nature and extent of Japanese-owned property. I returned to the United States to report my findings on or about July 12, 1945. It was then decided to establish an office of the Office of Alien Property Custodian for the Philippines in Manila, and I returned to the Philippines as Manager of such office in the middle of September 1945. I continued in that capacity until late in February 1947 and remained in the Philippines from September 1945 to February 1947 except for two absences in the United States on business connected with my office, one for about three weeks in February 1946, and the other for about three months in the fall of 1946.

5. During my survey trip in the period May to July 1945, I covered substantially the entire area of the Philippines, including the island of Mindanao, where there was substantial Japanese property. I was, however, unable to visit Northern Luzon because the continued fighting there made this impossible until much later.

6. In June 1945, I arrived by U. S. Army plane at Davao, the principal city of Mindanao. Our military forces had captured Davao City, but fighting continued in the hemp fields south of the city. I flew over the area in an Army plane and actually saw the battle. This was toward the end of June 1945.

7. The fighting continued even beyond the formal surrender of Japan (September 2, 1945), with the cleaning up of isolated groups of the enemy, especially on Northern Luzon; and skirmishes even outside of Manila itself at least as late as June 1945. I personally saw at that time battle casualties brought into the hospitals in Manila.

8. I am definitely of the opinion that there were no commercial means of transportation and communication among the Islands as late as December 31, 1945, and no ships or planes were operating other than those of our armed forces. This condition, I am positive, continued certainly until early spring of 1946.

So far as my offices were concerned, communication between Manila, the principal office, and the Davao Branch Office was entirely by army radio, and transportation was by army planes until after December 31, 1945.

My recollection is that there was no telephone service for civilians until well after January 1, 1946.

9. Even in Manila, a city of approximately a million and a half population, all normal life was completely disrupted throughout the year 1945. Large areas were devastated. Water mains were broken, telephone and telegraph lines were down. Surface transportation hardly existed except by mili-

tary vehicles, and the only lighting was furnished by our military. With few exceptions, all government buildings had been severely damaged or completely destroyed. The city of Davao, largest city on the island of Mindanao, located on the southeast coast, was severely damaged, as were most of the towns and cities throughout the Philippines. Land transportation was almost impossible due to the destruction of roads and bridges. Travel among the Islands is only possible by plane or boat, as there are large bodies of water separating them.

Conditions were truly chaotic throughout the Philippines until well into the year 1946.

/s/ ROGER E. BROOKS
ROGER E. BROOKS

Subscribed and sworn to before me this 25th day of June, 1952.

(Sgd) ELIZA W. MERRILL
*Notary Public, D. C.*

My commission expires: Nov. 30, 1953.

(NOTARIAL SEAL)

## APPENDIX 2

October 9, 1952

Honorable Robert Stern
Acting Solicitor General
Department of Justice
Washington, D. C.

*Re: Flaviana Tan, et als,* v. *United States, No. 382.*

Dear Mr. Stern:

On October 7, 1952, I filed a Petition for a Writ of Certiorari in the Supreme Court of the United States in the above-entitled case.

I have just been advised that Mr. Ernest Schein has filed a similar petition on behalf of the following:

Francisca De Guia and Beatriz B. Palmares
Court of Claims No. 50342
Pauling Lorenzo—Court of Claims No. 50357
Raymundo F. Novarro—Court of Claims No. 50358

In the case of *Compania Maritime,* No. 50165, Court of Claims, I have noted from the Government's answer that the Government admits the taking of the property involved and that the only questions remaining are the value thereof and the Statute of Limitations, which was specifically pleaded. Counsel for the plaintiff advises me that negotiations have been going on with a view to reaching an agreement as to the value of the property, but that the question of the Statute of Limitations will be left open, and that Government counsel has indicated to him that the Government will persist in its position respecting it.

In the cast of *Marcos* v. *United States,* No. 50278, Court of Claims, in which I am of Counsel, the Court of Claims has taken jurisdiction, which will require a trial on the merits and the taking of testimony in the Philippines in connection

therewith. In that case, which is the basic case upon which the decision in the *Tan* case is based, Government counsel has indicated that the Government will persist in its position taken in the Court of Claims with respect to the Statute of Limitations.

All of the foregoing means to me that the Government will petition for a Writ of Certiorari at some time in the future respecting the application of the Statute of Limitations, whether or not it was tolled during the war, and for what period, in Philippine requisition cases.

In these circumstances, it would seem reasonable for me to request that your Department not oppose the granting of the writ in the *Tan* case and in the cases represented by Mr. Schein, so that the question of the application of the Statute of Limitations may be determined in those cases. The basic questions involved in all of these cases are the same and can be determined without the necessity of a trial on the merits in cases where the Government has lost. There would seem to be no valid reason to put plaintiffs and their counsel, as well as the Government, to what may well be unnecessary expense.

In addition, if the petitions are denied in the subject cases and granted in the cases which the Government desires to and will seek to bring up, it would be extremely unfair to these claimants.

I trust you will give this request your serious and favorable consideration.

Very truly yours,

PREW SAVOY

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

October 17, 1952

Mr. Prew Savoy
World Center Building
Sixteenth and K Streets, N. W.
Washington, D. C.

*Re: Tan* v. *United States, No. 382, O.T., 1952*

Dear Mr. Savoy:

I have your letter dated October 9, 1952, in which you inquire whether the United States would be willing to acquiesce in the granting of the above entitled petition for a writ of certiorari.

I understand that you had a conference in this matter with Mr. Gamer and several other attorneys of the Claims Division in which Government counsel were of the opinion that they could not accede to your request.

I do not feel that I can make a final decision in this matter at the present time before I have examined the draft opposition to be prepared by the Claims Division. This, of course, will have to await the service upon the Department of the printed record and petition.

Sincerely yours,

ROBERT L. STERN,
*Acting Solicitor General*

October 28, 1952

Honorable Robert L. Stern
Acting Solicitor General
Washington, D. C.

*Re: Tan* v. *United States, No. 382, O.T., 1952*

Dear Mr. Stern:

Reference is made to your letter of October 17, 1952, in reply to my letter of October 9, 1952, in which you say that you understand I have conferred on this matter with attorneys in your department who were of the opinion that they could not accede to my request and that a final decision by you will not be reached until my printed record and petition have been served upon you.

I did not attend the conference mentioned in your letter as I had no knowledge that such a conference would be held. I understand that Mr. Ernest Schein did have such a conference in relation to his cases.

If, for any reason, you conclude that you cannot accede to my request, or reach the same result in some other manner so that the case may not be heard upon the merits by the Supreme Court, I would appreciate a conference on the subject with your department prior to the filing of the Government's reply to my petition for a writ of certiorari.

Very truly yours,

PREW SAVOY

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

November 18, 1952

Prew Savoy, Esq.
World Center Building
Washington, D. C.

*Re: Flaviana Tan, etc.* v. *United States, No. 382*

Dear Prew:

In accordance with your request, I am sending you a copy of the page proof of the Government's brief in opposition. You will particularly note footnote 7 in which we state that if it were thought that the Court would reach the point of the *Marcos* case, we would not oppose certiorari. That leaves it up to the Court.

With personal regards.

Sincerely yours,

/s/ Bob
Robert L. Stern,
*Acting Solicitor General*

DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

Prew Savoy, Esq. November 20, 1952
World Center Building
16th and K Streets, N. W.
Washington, D. C.

*Re: Flaviana Tan, et al.* v. *United States,*
*U. S. Sup. Ct., Oct. Term, 1952, No. 382*

Dear Mr. Savoy:

Your letter of November 14, 1952, asks me not to oppose the petitions for writs of certiorari in the *Tan and allied De Guia* cases.

The ground most strongly urged by you and the other interested attorneys for the Government's acquiescing in these petitions is that they present the same issues as are raised in *Marcos* v. *United States,* Ct. Cls. No. 50278, and the *Marcos* issues admittedly affect a substantial number of pending cases. The Government's Briefs in Opposition, which you will receive shortly, place the facts relating to the importance of the *Marcos* issues before the Supreme Court, and also indicate that the Government would not oppose certiorari in these cases if it believed that the Court would or should reach the *Marcos* issues. If the Court feels, contrary to our view, that these issues are likely to be reached, it will have before it the Government's agreement that these matters are important, and will, of course, grant certiorari if it desires to settle the broader questions.

As for the equities of the situation, the Government is bound by law to raise the defense of the statute of limitations, when it is believed to be applicable, and neither I nor any other executive official is authorized to waive it. Congress, as you know, is in a different position.

Sincerely yours,

JAMES P. MCGRANERY,
*Attorney General.*